On or about the 26th day of August, 1951, the plaintiff informed the defendant that the document executed the day before was invalid according to the advice he had received and it was proposed to make a fresh document importing the same terms. He further requested the defendant to put his signature on a paper in blank in order to save him the trouble of coming again, assuring him that his signature would be used as a witness to the signature of the said Mohamed Tahir. He also requested the defendant to show him his identity card. The defendant relying on the statement of the plaintiff put his signature to the blank paper and also produced his identity card to the plaintiff.

The learned trial Judge found it impossible to accept the evidence of either party as in every respect true, but came to the conclusion that the document sued upon was genuine in the sense that it was written out on the date which it purports to bear and that it was signed by the defendant after it was written.

When he came to consider the document itself the learned Judge was satisfied that it was not a contract for the sale of land but was a contract relating to and connected with a loan of money made by the plaintiff either to the defendant or to somebody else for whom the defendant stood surety. In coming to this finding of fact it seems clear that the learned trial Judge had in mind that the land referred to in the document sued upon was Malay Reservation land and that the plaintiff in order to secure a loan would have recourse to a document of this nature purporting to be a contract of sale. On this finding of fact judgment was entered for the plaintiff for $3,000 interest and costs.

It was argued on behalf of the plaintiff/appellant that having regard to the law, that is the Malay Reservation Enactment, Cap. 142, the learned trial Judge should have disregarded the question of a loan as such a loan was unenforceable and unrealisable against Malay Reservation land and should have held that the transaction between the parties was a contract for specific performance and was subject to the Land Code, 1926, the Contract Ordinance 1950 and the Specific Relief Ordinance 1950 and accordingly ordered specific performance.

I agree that the plaintiff was entitled to an Order for specific performance though not quite for the reasons put forward. I feel with respect that having found as a fact that the document was genuine in the sense that he did and, as there was no issue raised in the pleadings or in the evidence that the plaintiff had loaned money to the defendant, the learned trial Judge in accordance with the finding of fact regarding the document should have ordered specific performance.

I would therefore allow the plaintiff's appeal and order specific performance on the contract sued upon and order that the defendant do execute a valid and registrable transfer in favour of the plaintiff of the land held under E. M. R. Rungkup 2623 Lot 2390 free from all encumbrances. The plaintiff to have the costs of this appeal and refund of his deposit. The defendant's cross-appeal to be dismissed with forfeiture of deposit.

Since writing the above I have read the judgments in *Blay v. Pollard & Morris*[1]. I feel the judgments in this case, particularly that of Scrutton L.J. support the view I have expressed.

RENGASAMY v. ANNAMALAI

[C. A. (Mathew C.J., Whyatt C.J. (S) and Wilson J.) October 21, 1955]

[K. L. — F.M. Civil Appeal No. 22 of 1955]

Civil appeal — Contention on appeal that trial Court had no jurisdiction to try the case — Defect in jurisdiction must appear on the face of the proceedings.

This was an appeal from the decision of the High Court ordering *inter alia* "that the defendant do return to the plaintiff the eating-shop . . . with all chattels and fittings as described in the agreement dated the 30th day of July, 1951." At the appeal, counsel for the appellant contended that the agreement annexed to the plaint was a tenancy agreement and that the respondent should have applied to the Rent Control Board under s. 12 of the Control of Rent Ordinance 1948 for permission to the institution of the present suit and as the respondent had omitted to do so, the High Court had no jurisdiction. This point was not raised before the trial Court.

Held: (1) the appellant can only succeed on the jurisdiction issue if the defect in jurisdiction was patent on the face of the proceedings; (2) in this case the defect in jurisdiction was not patent on the face of the proceedings and therefore the appeal must be dismissed.

Cases referred to:—

(1) *Farquharson v. Morgan* (1894) 1 K.B. 552.

(2) *Buggin v. Bennett* 4 Burr. 2037.

CIVIL APPEAL.

H. L. Wrigglesworth for the appellant.

A. K. Sen for the respondent.

Mathew C.J. (with whom **Whyatt C.J.(S.)** and **Wilson J.** agreed) : — This is an appeal from the decision of the High Court ordering *inter alia* :—

"That the defendant do return to the plaintiff the eating-shop at No. 25 Camp Road, Port Swettenham, with all chattels and fittings as described in the agreement dated the 30th day of July, 1951."

Mr. Wrigglesworth for the appellant has contended that the agreement annexed to the plaint was a tenancy agreement, and that the respondent should have applied to the Rent Control Board under section 12

of the Rent Control Ordinance, 1948 for permission to the institution of the present suit and, having omitted to do so, the High Court was without jurisdiction. This point has been raised for the first time before us. The case proceeded in the Court below on the basis that the two points for decision were :—

(a) was the agreement extended? and

(b) did the plaintiff tender to the defendant the $1,000 due under clause 7 of the agreement?

I can see no reason for disagreeing with the learned trial judge as to his findings on these two issues.

Mr. Wrigglesworth agreed that to succeed on his main ground of appeal it was necessary for him to satisfy this Court that the agreement annexed to the plaint must be capable of being construed as a landlord and tenant agreement without reference to the evidence which was recorded in the High Court. He has submitted that exclusive possession of the coffee-eating-house business premises flowed irresistably from the letting of the business and that there could not be a letting of the business without a letting of the premises. The agreement refers throughout to the letting of the business, and clause 3 deals with rent as follows :—

"The said renter shall on the first day of each and every month during the continuance of this agreement without fail pay to the vendor the said rent of $150 (dollars one hundred & fifty only) for the use of the furniture and fittings as enumerated herein below and for the conduct of the said business."

Clause 4 allows the appellant to collect the rent from the upstairs sub-tenants of the respondent and to enjoy them for himself. In my view, it is unnecessary to decide this point one way or the other, and I will content myself with saying that it is doubtful whether the agreement can be construed in the sense that the appellant would have it.

The decisive point in this appeal is whether the appellant is entitled to benefit from the jurisdiction issue. I think the answer is to be found in *Farquharson v. Morgan*[1]. The first part of the head-note reads :—

"Where total absence of jurisdiction appears on the face of the proceedings in an inferior Court, the Court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior Court."

A clear distinction is drawn in this case between patent and latent defects in jurisdiction. Lopes L.J. says (at p. 559) :—

"The result of the authorities appears to me to be this: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled."

In Davey L.J.'s judgment, he quotes from Lord Mansfield's judgment in *Buggin v. Bennet*[2], the following passage (p. 562) :—

"If it appears on the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence; because all is a nullity; it is *coram non judice*. But where it does not appear on the face of the proceedings, if the defendant will lie by and suffer that Court to go on under an apparent jurisdiction, as upon a contract made at sea" (he was dealing with an Admiralty case), "it would be unreasonable that this party who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there and suggest that collateral matter as a cause of prohibition and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the Court below."

The learned Lord Justice continues :—

"The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is explained by Coleridge J. in Marsden v. Wardle (3 E & B 695 at p. 701). 'There is reason' says the learned Judge 'for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then if he chooses to wait and take the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below; because the complaint in that case does not rest on the evidence of the complainant; and, if such a defective record were allowed to remain and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal'."

In this case the defect in jurisdiction is not patent on the face of the proceedings, and I would require far more extended argument than we enjoyed before I were satisfied that in fact there was any defect in jurisdiction.

I would dismiss the appeal with costs and order the deposit to be paid to the respondent's solicitor.

Appeal dismissed.

Solicitors : *S. M. Yong & Co.; A. K. Sen.*

YUSOFF & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Wilson and Buhagiar JJ.) October 21, 1955]

[K. L. — F.M. Criminal Appeal No. 38 of 1955]

Evidence Ordinance, 1950, s. 30 — Confession of one accused — Whether sufficient to establish guilt of a co-accused and himself — Issues of fact relevant to the charge.

Criminal Procedure Code (Cap. 6), s. 198 — Judgment on points of law.

This was an appeal against the conviction of the appellants for the murder of an unknown Malay woman. The prosecution case depended almost entirely on a confession made by the 2nd appellant to a Magistrate. That confession laid the entire blame for the killing on the 1st appellant. When brought before the Magistrate the 2nd appellant told the Magistrate that he decided